Supreme Court, U.S.
FILED
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(1)

No. 03-

IN THE

Supreme Court of the United States

WAGNER D. JACKSON, JR.,

Petitioner,

v.

U.S. DEPARTMENT OF JUSTICE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May a circuit court base its ruling on the appeal of an employment discrimination case *entirely* upon *its finding of fact* regarding Petitioner's job qualifications when (1) the district court decided that appellant was qualified and based its dismissal on an alternative rationale later rejected by the circuit court, (2) the EEOC decided that appellant was qualified and based its dismissal on the same alternative rationale later rejected by the circuit court, (3) neither party appealed the issue of job qualification, (4) neither party's circuit court briefs even mentioned, never mind advocated, the circuit court's finding of fact, (5) there is absolutely no support in the entire litigation record supporting the circuit court's finding of fact, and (6) the circuit court cites nothing at all supporting its finding of fact, *i.e.*, may a circuit court simply fantasize facts into existence and base its decision entirely upon said fantasy with absolutely no support from the district court, the EEOC, the arguments of counsel, or any part of the litigation record as a whole?

PARTIES TO THE PROCEEDING

Petitioner is Wagner D. Jackson, Jr., *pro se*.

Respondents are the United States Department of Justice and John D. Ashcroft, Attorney General.

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Wagner D. Jackson, Jr., petitioner *pro se*, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The original opinion and the amended opinion of the court of appeals and the opinion of the district court are attached. Appendix ("App."), *infra*, 1a-8a.

STATEMENT OF JURISDICTION

The original judgment of the court of appeals was entered on 29 September 2003. App., *infra*, 3a-4a. A petition for rehearing was denied on 3 February 2004. App., *infra*, 9a-10a. The amended judgment of the court of appeals was also entered on 3 February 2004. App., *infra*, 1a-2a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY LAW

The Fifth Amendment to the United States Constitution provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

42 U.S.C. § 2000e *et seq.* provides:

> (a) Employer practices. It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual

> with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id. at § 2000e-2.

42 U.S.C. § 2000e *et seq.* also provides:

> (a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage. All personnel actions affecting employees or applicants for employment . . . in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from and nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the General Accounting Office, and the Library

> of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

Id. at § 2000e-16.

FRCP Rule 52 provides:

> . . . Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses . . .

FRCP Rule 52 (Advisory Committee Notes, 1985 Amendment) provides:

> To permit courts of appeals to share more actively in the fact-finding function would tend to undermine the legitimacy of the district courts in the eyes of litigants, multiply appeals by encouraging appellate retrial of some factual issues, and needlessly reallocate judicial authority.

STATEMENT OF THE CASE

This action for racial discrimination in employment is brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

Petitioner has been a trial attorney in the U.S. Department of Justice ("DOJ"), Civil Division, Torts Branch, Environmental Torts Section since September 1991. Respondents are DOJ and its Attorney General John D.

Ashcroft. On 31 May 1994, Petitioner applied for transfer to one of several open positions in the U.S. Department of Justice, Environment and Natural Resources Division ("ENRD") in the Environmental Crimes, Environmental Enforcement and Environmental Policy sections. On 10 January 1995, Petitioner's applications were rejected without an interview.

On 30 January 1995, Petitioner initiated an Equal Employment Opportunity ("EEO") action within the DOJ. This started the one month informal review period required by DOJ's EEO regulations, 29 C.F.R. Ch. XIV §§ 1614.105, 1614.108. This informal review *requires* the complaining party and the DOJ hiring officials to discuss EEO disputes before they become formal EEO actions. Yet the ENRD hiring officials involved in this case *willfully violated these regulations by refusing to take part in any discussions with Petitioner*. Apparently, the DOJ hiring officials involved in this case felt free to ignore mandatory EEO regulations. DOJ's administrative findings of fact identify the responsible hiring officials as (1) Pauline H. Milus (Chief, Environmental Policy), (2) Louise F. Milkman (Asst. Chief, Environmental Policy), (3) Ross L. Connealy (Asst. Chief for Administration, Environmental Enforcement), (4) Ronald A. Sarachan (Chief, Environmental Crimes Section), (5) Gregory F. Linsin (Asst. Chief, Environmental Crimes Section), and (6) John C. Cruden (former Chief, Environmental Enforcement Section). DOJ concedes that all six of these people are white.

On 25 April 1995, Petitioner initiated a formal complaint. This started the six month formal review period. 29 C.F.R. Ch. XIV §§ 1614.105, 1614.108.

On 31 October 1995, DOJ released its administrative findings of fact. These findings are required under DOJ's EEO regulations.

> If [informal review] is unsuccessful, the EEO counselor notifies the employee of her right to file a formal administrative complaint with the employing agency itself. *See* 29 C.F.R. § 1614.105(d). Upon receiving the complaint, the employing agency conducts an investigation in order to 'develop a complete and impartial factual record upon which to make findings on the matters raised by the . . . complaint.' 29 C.F.R. § 1614.108(b).

Crawford v. Babbitt, 148 F.3d 1318, 1321-22 (11th Cir. 1998).

The DOJ administrative findings of fact concede that Petitioner is African American and Native American, that there were multiple vacancies in each of the three DOJ sections to which Petitioner applied, that Petitioner properly applied for employment in these three sections, that these vacancies were ultimately filled, and that Petitioner was qualified for all the positions in each of the three sections. This establishes Petitioner's *prima facie* case under *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973).

On 26 April 1996, the case was transferred from DOJ to the Equal Employment Opportunity Commission ("EEOC").

On 3 January 1997, EEOC Administrative Judge Samuel Teitelman issued an order stating that all discovery was to be completed within 90 days. On 21 January 1997, Petitioner made his first discovery request. DOJ did not comply. On 10 February 1997, Petitioner filed a motion to compel discovery. DOJ responded on 28 February 1997 by opposing to the

motion to compel and filing its motion for summary judgment.

On 30 April 1997, EEOC Administrative Judge Rebecca Dickinson granted summary judgment for Respondents based on *Robinson v. Adams*, 847 F.2d 1315, 1316 (9th Cir. 1987) (holding that the *McDonnell Douglas prima facie* case creates no reasonable inference of racial discrimination if plaintiff cannot prove as part of his *prima facie* case that defendant *knew* he is a member of a racial minority). Admin. Judge Dickinson decided that since Petitioner could not prove this awareness, she would dismiss the case without Petitioner having an opportunity to take any discovery *or even file an opposition brief.* After Petitioner's complaints, Admin. Judge Dickinson vacated her April 30th order and allowed Petitioner to file an opposition brief, but Petitioner's discovery requests were still ignored. On 17 June 1997, Admin. Judge Dickinson again granted summary judgment in an opinion unchanged from the vacated opinion. Both opinions also included her finding *arguendo* that Petitioner was qualified for all positions in question.

On 18 August 1997, the DOJ Complaint Adjudication Office, having replaced the DOJ Federal Programs Branch, entered its final decision pursuant to 29 C.F.R. Ch. XIV § 1614.110, and Petitioner appealed this decision to the EEOC Office of Federal Operations ("OFO") on 15 October 1997. On 13 July 1999, the EEOC/OFO Acting Director Carlton Hadden affirmed the DOJ final decision in a two sentence opinion.

On 4 August 1999, Petitioner filed a complaint in the District Court for the District of Columbia and served it upon Respondents. In violation of Fed. R. Civ. P. 4, Respondents failed to answer and Petitioner filed a motion for default

on 13 October 1999. On 26 October 1999, the motion was granted and Respondents were declared to be in default. On 28 October 1999, the District Court granted DOJ's 26 October 1999 motion for an extension of time to file an answer to the complaint.

On 7 December 1999, Petitioner filed for summary judgment in the District Court. On 7 January 2000, Respondents filed a cross-motion for summary judgment.

On 18 August 2000, the District Court denied both motions for summary judgment and denied as moot Respondents' motion to stay discovery pending disposition of the motions for summary judgment.

On 14 October 2000, the District Court held a hearing on Petitioner's motion to compel discovery regarding the qualifications of the 23 identified attorneys hired instead of Petitioner and Respondents' motion to continue the 20 November 2000 trial date. The District Court denied Petitioner's motion and vacated the trial date due to court calendar conflicts.

On 20 June 2001, Respondents renewed their earlier motion for summary judgment and Petitioner responded by renewing his earlier motion.

On 6 May 2003, the District Court granted Respondents' renewed motion for summary judgment in a two page opinion *without a single citation*. The district court also found *arguendo*, however, that Petitioner was qualified for every position in question. Appendix at 6a.

On 12 May 2003, Petitioner filed an appeal in the Circuit Court for the District of Columbia. There was no cross-appeal.

On 30 June 2003, Respondents filed a motion for summary affirmance of the District Court.

On 29 September 2003, the Circuit Court granted Respondents' motion citing *Robinson*. App. at 3a-4a.

On 27 October 2003, Petitioner filed for rehearing *en banc* criticizing the Circuit Court Panel's reliance on *Robinson* because it violates binding precedent and is not applicable to a case which reaches step two of the *McDonnell Douglas* analysis.

On 3 February 2004, the Panel filed an Amended, Opinion, app. at 1a-2a, renouncing its reliance on *Robinson* and basing its reliance *on the Panel's finding of fact* that DOJ rejected Petitioner's job application in 1994, not because DOJ decided that Petitioner was *unqualified,* but because DOJ decided that Petitioner was simply *less qualified than the other applicants.* This finding of fact by the appellate court is contrary to DOJ's administrative finding of fact (Petitioner is qualified), contrary to the two opinions of the EEOC, (Petitioner is qualified), contrary to the Opinion of the District Court, app. at 5a-6a (Petitioner is qualified), contrary to DOJ's briefs in the circuit court (Petitioner is not qualified), and indeed contrary to all of the briefs filed by both parties throughout the entire litigation history. Not surprisingly, the Panel cites nothing in support of its fact finding.

REASONS FOR GRANTING THE PETITION

Review on a writ of certiorari should be granted in this racial discrimination in employment case because the District of Columbia Circuit below "has decided important federal question(s) in a way that conflicts with relevant decisions of this Court" and other U.S. Courts of Appeal and the Federal Rules of Civil Procedure. Furthermore, the D.C. Circuit below "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Rule 10(a), (c).

I. Fact Finding By A Circuit Court Violates The Fifth Amendment, Fed. R. Civ. P. 52(a), Binding Precedent Of This Court, And The Precedent Of Circuit Courts, Including The D.C. Circuit Itself

The Fifth Amendment to the United States Constitution provides: "No person shall be. . . deprived of life, liberty, or property, without due process of law . . ." In fleshing out what constitutes due process, Federal Rule of Civil Procedure 52(a) says: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." The Advisory Committee Notes for Rule 52(a) (1985 Amendment) provide: "To permit courts of appeals to share more actively in the fact-finding function would tend to undermine the legitimacy of the district courts in the eyes of litigants, multiply appeals by encouraging appellate retrial of some factual issues, and needlessly reallocate judicial authority."

Furthermore, this Court has held that not only are findings of fact by a district court binding on an appellate court, unless clearly erroneous, but that this also applies to factual inferences drawn from undisputed basic facts. *Commissioner of Internal Revenue v. Duberstein*, 363 U.S. 278, 291 (1960). In this case, the EEOC and the district court were not just drawing factual inferences when they decided the qualification issue in Petitioner's favor; they were *compelled* to find that Petitioner was qualified for all positions in question because DOJ's administrative findings of fact included this conclusion.

This Court has also held that appellate courts have *even less authority* to engage in factfinding when two separate fact finders have reached the same conclusion: "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). In this case, the circuit court was presented with three concurrent findings of fact, *i.e.*, DOJ administrative findings of fact, the EEOC opinions and the district court's opinion.

Finally, this Court has applied to the context of employment discrimination the principal that an appellate court may not reverse lower court findings of fact even if it would have weighed the evidence differently:

> This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court

> oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo . . . If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573-74 (1985) (citations omitted). In this case, the appellate court did not just weigh the evidence differently, it made up its own imaginary evidence without citing any support in the litigation record.

The D.C. Circuit itself has stated this principle even more strongly: *Bellevue Gardens, Inc. v. Hill*, 297 F.2d 185, 186-87 (D.C. Cir. 1961) ("We have said that it is not our function to weigh the evidence . . . and indeed the very integrity of our judicial system rests on no principle more firmly than on that which precludes retrial of fact issues under the form or guise of appellate review."). Other circuits agree: *Cordovan Associates, Inc. v. Dayton Rubber Co.*, 290 F.2d 858, 859 (6th Cir. 1961) ("Even though an appellate court may draw different factual inferences from those of the district court, it is not free to do so."); *Woods Const. Co. v. Pool Const. Co.*, 314 F.2d 405, 406 (10th Cir. 1963) ("The appellate courts, under Rule 52(a), do not have the power to review

the evidence in the record and supply the findings of fact necessary to determine the issues.").

Despite this old, repeatedly stated, overwhelmingly clear authority to the contrary, not only did the D.C. Circuit reject the factual findings of the DOJ, the EEOC, and the district court, it went beyond just rejecting those findings and ordering a remand. The D.C. Circuit actually made up its own findings of fact, ultimately decided the appeal entirely on the basis of these fantasy facts, and based this usurpation on absolutely no evidence whatsoever. It cited nothing, because there is nothing it could cite.

II. Even Under An Illegal *De Novo* Review, The D.C. Circuit's Findings of Fact Regarding Petitioner's Job Qualifications Would Still Be Prohibited

In this racial discrimination in employment case, Respondent DOJ has produced administrative findings of fact that Petitioner is African American and Native American, that there were multiple vacancies in each of the three DOJ sections to which Petitioner applied, *and that Petitioner was qualified for all the positions in all three sections. See supra* at 4-5. This establishes Petitioner's *prima facie* case under the three part discrimination analysis of *McDonnell Douglas*, 411 U.S. at 802.

Nonetheless, throughout this litigation, DOJ's attorneys have consistently asserted in their briefs the almost surreal claim that Petitioner *was unqualified for every position in question,* and they merely repeated this claim before the D.C. Circuit. DOJ's attorneys have repeatedly contradicted *DOJ's own findings in fact in this case* despite Petitioner's citation in briefing the district court of authority by the very same

district court judge (Thomas Penfield Jackson) *requiring* the district court to adopt DOJ's administrative finding on Petitioner's job qualifications. *Diamond v. Roskens*, 790 F. Supp. 350, 353 (D. D.C. 1992) ("This Court will, however, join the others having held, in such cases, that a government agency is bound by the results of an administrative determination favorable to its employee upon a complaint of employment discrimination, and is not entitled to a *de novo* trial and judgment in federal court").

DOJ's only alternative argument for dismissal is based on *Robinson v. Adams*, 847 F.2d 1315, 1316 (9th Cir. 1987) (holding that the *McDonnell Douglas prima facie* case creates no reasonable inference of racial discrimination if plaintiff cannot prove as part that case that defendant *knew* plaintiff is a member of a racial minority). *See supra* at 6-8. Presented with the restriction in *Diamond*, the district court dismissed Petitioner's case essentially on *Robinson*, but without citing it or anything else. Petitioner had informed the district court that *Robinson* both violates binding precedent and is irrelevant in a case like Petitioner's in which the defendant has given its *McDonnell Douglas* step two response to plaintiff's step one *prima facie* case. Once defendant offers its step two explanation for its decision, whether plaintiff actually had a step one *prima facie* case becomes irrelevant, and the case is decided at step two or step three. *U.S. Postal Service v. Aikins*, 460 U.S. 711, 715 (1983). Presumably, the district court chose to disingenuously rely on *Robinson's* logic, without citing *Robinson,* so that it could apply the analysis outside of *McDonnell Douglas* step one. Of course, the effort fails because moving the *Robinson* requirement to step three does not save DOJ from its step two obligation to explain its decision. Since DOJ's attorneys just challenge

Petitioner's job qualifications, DOJ plainly cannot meet this test.[1]

On appeal, Petitioner criticized the district court for dismissing Petitioner's case without citation of any authority whatsoever, and the circuit court affirmed dismissal *by expressly relying on Robinson. See supra* at 8. The circuit court also made up a back up rationale *by finding as fact, right out of the clear blue sky,* that DOJ rejected Petitioner's job applications for all positions in question, not because DOJ decided that Petitioner was *unqualified,* but because DOJ decided that Petitioner was simply *less qualified than the other applicants. Id.* Notwithstanding this inventive rearrangement of the facts, the only DOJ statements on Petitioner's qualifications are the administrative finding of qualified for all positions, and the assertions of the hiring officials and DOJ's attorneys that Petitioner was not qualified at all for any of the positions. Both the EEOC and the district court adopted the DOJ administrative finding because they were required to adopt it because the DOJ administrative finding essentially erases the assertions of the hiring officials. Consequently, the circuit court was also *required* to adopt this finding, and would have been so required even on *de novo* review, just like the EEOC and the district court.

On petition for review *en banc,* Petitioner criticized the circuit court panel for failing to note that, for the reasons noted above, it could not rely on *Robinson* in this case, and

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1. As already noted, the district court also found *arguendo* that Petitioner was qualified for every job position in question, echoing the EEOC opinions and DOJ's administrative findings. *See supra* at 5-7.

the circuit court panel responded with an amended opinion renouncing its reliance on *Robinson* and reasserting its fantasy finding of fact *as its only rationale* for affirming dismissal. *See supra* at 8. The circuit court also denied Petitioner's motion for rehearing *en banc*. *Id.*[2]

In brief, Petitioner has been a trial attorney in the DOJ Environmental Torts Section since September 1991. On 31 May 1994, Petitioner applied for transfer to one of several open positions in the DOJ Environmental Crimes, Environmental Enforcement and Environmental Policy sections. Petitioner's applications were rejected without an interview, and Petitioner initiated an informal EEO action. The initial informal EEO review *requires* the complaining party and the DOJ hiring officials to discuss EEO disputes in person before they become formal EEO actions. Yet the hiring officials involved in this case *willfully violated these regulations by refusing to take part in any discussions with Petitioner*. *See supra* at 4. When Petitioner initiated a formal complaint, these DOJ hiring officials were required to sign affidavits stating the qualifications for the open positions in their sections and describing how they filled these positions. The hiring officials all said that Petitioner's application was rejected because Petitioner was not qualified for any of the open positions in their sections. The DOJ investigator reviewed these statements, Petitioner's qualifications, and

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2. On petition for review *en banc*, Petitioner also criticized the circuit court panel, to no avail, for basing its original decision, even in part, on this fantasy finding of fact. *See supra* at 8. There is *absolutely nothing* in the DOJ administrative findings, the briefs of either party, the EEOC opinions, or the district court opinion suggesting that anyone at DOJ ever found Petitioner to be somewhat qualified but not qualified enough.

the qualifications of some of the attorneys hired instead of Petitioner, and concluded that Petitioner was qualified for all the positions in all three DOJ sections to which Petitioner applied.

This was the record before the circuit court, and there is absolutely nothing in this record even suggesting that anyone decided that Petitioner was qualified in some sense but not qualified enough. Circuit courts are not permitted to engage in fact finding even when there is some basis for their findings, and there is no support for the D.C. Circuit's unlawful factfinding in this case. Even the district court's fact finding was bound by DOJ's administrative findings. *Diamond*, 790 F. Supp. at 353. The decision of the D.C. Circuit in this case is openly lawless.

CONCLUSION

Based on the legal authorities cited above and the factual record in this case, most importantly the Respondent's administrative finding that Petitioner was qualified for every position in question, this Court should reverse the decision of the D.C. Circuit, hold the Respondent in violation of 42 U.S.C. § 2000e *et seq.*, and order Petitioner's transfer to Petitioner's choice of the positions for which Petitioner applied in 1994.

Respectfully submitted,

WAGNER D. JACKSON, JR.
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(301) 649-6988

Petitioner pro se

APPENDIX A — AMENDED ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT FILED FEBRUARY 3, 2004

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 03-5134

September Term, 2003
99cv02086

Wagner D. Jackson, Jr.,

Appellant

v.

Department of Justice, U.S., et al.,

Appellees

BEFORE: Edwards, Sentelle, and Rogers, Circuit Judges

AMENDED ORDER

Upon consideration of the motion for summary affirmance, the opposition thereto, and the reply, it is

ORDERED that the motion for summary affirmance be granted: The merits of the parties' positions are so clear as to warrant summary action. *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Appellant Wagner D. Jackson, a Native American/African

Appendix A

American male, instituted this lawsuit against his former employer, the U.S. Department of Justice (DOJ), alleging race discrimination in hiring in violation of Title VII. In his complaint, Jackson asserted that despite his qualifications, the DOJ failed to hire him, because of his race, for one of three vacant attorney positions. Jackson cannot prevail, however, because he has not shown that the DOJ's legitimate, non-discriminatory reason for failing to hire him – that is, the other applicants were more qualified – was a pretext for discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973); *Morgan v. Federal Home Loan Mortg. Corp.*, 328 F.3d 647, 651 (D.C. Cir. 2003). This court, thus, has no occasion to rely on *Robinson v. Adams*, 847 F.2d 1315 (9th Cir. 1987).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk/LD

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT FILED SEPTEMBER 29, 2003

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 03-5134

September Term, 2003
99cv02086

Wagner D. Jackson, Jr.,

Appellant

v.

Department of Justice, U.S., et al.,

Appellees

BEFORE: Edwards, Sentelle, and Rogers, Circuit Judges

ORDER

Upon consideration of the motion for summary affirmance, the opposition thereto, and the reply, it is

ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Appellant Wagner D. Jackson, a Native American/African American

male, instituted this lawsuit against his former employer, the U.S. Department of Justice (DOJ), alleging race discrimination in hiring in violation of Title VII. In his complaint, Jackson asserted that despite his qualifications, the DOJ failed to hire him, because of his race, for one of three vacant attorney positions. The record, however, contains no evidence that the individuals who made the hiring determinations knew of Jackson's race. *Robinson v. Adams*, 847 F.2d 1315, 1316 (9th Cir. 1987) ("An employer cannot intentionally discriminate against a job applicant based on race unless the employer knows the applicant's race."). Thus, Jackson can not show unlawful discrimination by the DOJ. Even assuming Jackson could prove that the DOJ knew his race, he still would not prevail because he has not shown that the DOJ's legitimate, non-discriminatory reason for failing to hire him -- that is, the other applicants were more qualified -- was a pretext for discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973); *Morgan v. Federal Home Loan Mortg. Corp.*, 328 F.3d 647, 651 (D.C. Cir. 2003).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

s/ [illegible]

APPENDIX C — DECISION AND ORDER, AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED AND FILED MAY 6, 2003

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 99-2086 (TPJ)

WAGNER D. JACKSON, JR.,

Plaintiff,

v.

U.S. DEPARTMENT OF JUSTICE and
JOHN D. ASHCROFT, ATTORNEY GENERAL,

Defendants.

DECISION AND ORDER

Plaintiff Wagner Jackson, an attorney with the U.S. Department of Justice ("DOJ"), was one of several thousand lawyers who applied for one of several open positions elsewhere in the DOJ in the summer of 1994. His application was summarily rejected in January, 1995, along with most of the others, without an interview. He claims in this action to be a Native American/African American and his ethnicity to be the reason he was not offered one of the jobs. Defendants DOJ and the Attorney General deny the discrimination alleged, assert that other applicants were better qualified for the positions on the basis of their records alone, and, most significantly, that they were altogether unaware of plaintiff's ethnicity when his application was reviewed.

Appendix C

Plaintiffs claim of discrimination has likewise been rejected administratively within DOJ, and by the EEOC. Hence this *pro se* lawsuit. The parties have been given full opportunity to make an evidentiary record before the Court, and the case is now presented on cross-motions for summary judgment.

Assuming *arguendo* that plaintiff is what he claims to be, i.e., Native American/African American, and that he was, in fact, qualified for the positions for which he applied-matters as to which the Court makes no finding – the record is devoid of any evidence that anyone who considered his application at DOJ knew of his ethnicity at the time, or thereafter. No discrimination can be found in the absence of evidence that an alleged discriminator knew of a reason to discriminate.

It is, therefore, this 6th of May, 2003,

ORDERED, that defendants' renewed motion for summary judgment [39] is granted; and it is

FURTHER ORDERED, that plaintiff's cross-motion for summary judgment [40] is denied; and it is

FURTHER ORDERED, that the Clerk enter judgment for defendants and dismiss the complaint with prejudice.

s/ Thomas Penfield Jackson
Thomas Penfield Jackson
U.S. District Judge

Appendix C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 99-2086

WAGNER D. JACKSON, JR.,

Plaintiff(s)

v.

U.S. DEPARTMENT OF JUSTICE and
JOHN D. ASHCROFT, ATTORNEY GENERAL,

Defendant(s)

JUDGMENT
For Defendant

This cause having been considered by the Court on defendants motion for summary judgment, before the Honorable Thomas Penfield Jackson, Judge presiding, and the issues having been duly briefed by all parties, and the court having rendered its decision granting defendants motion, now therefore, pursuant to the decision of the Court,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff WAGNER D. JACKSON, JR. take nothing on the complaint against the defendant U.S. DEPARTMENT OF JUSTICE and JOHN D. ASHCROFT, ATTORNEY GENERAL and that the said defendant have and recover costs from the said plaintiff.

Appendix C

NANCY MAYER-WHITTINGTON, Clerk

By: s/ Robert E. West
Robert E. West, Deputy Clerk

Dated: 5-6-03

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DENYING PETITION FOR REHEARING FILED FEBRUARY 3, 2004

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 03-5134

September Term, 2003
99cv02086

Wagner D. Jackson, Jr.,

Appellant

v.

Department of Justice, U.S., et al.,

Appellees

BEFORE: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland,* and Roberts, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

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* Circuit Judge Garland did not participate in this matter.

Appendix D

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk/LD